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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 373

A. B. BOREN, W. W. SHEPHERD and C. D. HAMLOW,
Appellants,

vs.

STATE OF WASHINGTON, L. L. FOOTE and [illegible]
W. [illegible],

[illegible]

STATEMENT AS TO JURISDICTION

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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

and

L. L. FOOTE AND LANDO W. ZECH,

Co-Appellants,

vs.

A. E. BOREN, W. W. SHEPHERD, C. D. HARLOW AND R. T. STICKELS,

Respondents

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States as amended, respondents-appellants submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the Supreme Court entered in this cause.

Opinions Below

A. *Superior Court.* The case was tried before the Honorable Robert M. Jones, one of the Judges of the Superior Court for the State of Washington, County of King. This decision is unreported. Judge Jones held that the facts in this case brought the case squarely within the purport of a previous decision of the Supreme Court of the State of Washington, to-wit: the case of *State* v. *Brown*, 37 Wash. 97, 79 Pac. 635 (1905). The trial court decided that the statute upon which plaintiff relied was the same as the

statute relied upon in the case of *State* v. *Brown,* and since that case, being a decision of the Supreme Court, held that said statute was void and unconstitutional in that it violated the 14th Amendment to the Constitution of the United States, the trial court held that the case before him, being the instant case, seeking to enforce a statute with practically the same wording, was likewise void and unconstitutional.

B. *Supreme Court of Washington Decision.* The decision of the Supreme Court of the State of Washington in this case is reported in Volume 136 of the Advance Sheets page 481. Petition for re-hearing denied, 136 Washington Advance Sheets page 791. A copy of the opinion of the Court below is attached hereto as Appendix A. The salient portion of said opinion with reference to the constitutionality of the statute involved is as follows:

> "We agree with the general statement in *State v. Brown* that "to own and manage property is a natural right." But there is a clear distinction between the right of the state to interfere with the owning and managing of property, as such, and its right, under its police power, to protect the health of its people. Experience has shown that the care and treatment of the teeth requires, not only skill, but the personal relationship between dentist and patient. It requires the services of a trained expert, learned in his profession. The care and treatment of the teeth is not a business. It is not a commercial transaction. It is a profession. A person may own and sell dental equipment and supplies. But the state, in the exercise of its police power, has said that he cannot, without a license, practice dentistry. The state has said, in its wisdom, that a person practices dentistry "who owns, maintains or operates an office for the practice of dentistry." There can be no question but that the activities of Boren and Shepherd come within this definition. The state has decided that such a practice does not adequately pro-

tect the health of its people. Clearly, such a regulation is a reasonable exercise of its police power.

"For the reasons hereinabove assigned, the decision in *State v. Brown* is hereby overruled."

Jurisdiction

The decision of the Supreme Court of the State of Washington was rendered on the 7th day of June, 1950. A petition for rehearing was filed within the time required by law, and on July 19, 1950, the Court denied said petition for rehearing. A petition for appeal is presented herewith and filed on the 30 day of August, 1950. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, U. S. Code, Sections 1253 and 2101-b.

The statute involved is Remington Revised Statutes of Washington, Section 10031-4 and 10031-6. Section 10031-4 prohibits the practice of dentistry by any person without a license. Section 10031-6 reads as follows:

> "A person practices dentistry, within the meaning of this act, who represents himself as being able to diagnose, treat, remove stains and concretions from teeth, operate or prescribe for any disease, pain, injury, deficiency, deformity or physical condition of the human teeth, alvealar process, gums, or jaw, or who offers or undertakes by any means or methods to diagnose, treat, remove stains or concretions from teeth, operate, or prescribe for any disease, pain, injury, deficiency, deformity, or physical condition of the same or take impressions of the teeth or jaw, or who owns, maintains or operates an office for the practice of dentistry, * * *"

That portion of the statute applicable to the situation before the Court is the last portion quoted which provides "One Who Owns, Maintains or Operates an Office for the Practice of Dentistry * * * Practices Dentistry."

Article XIV, Section 1, of the Constitution of the United States provides as follows:

> "Citizenship—Equality of Rights.—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Sections 3, 12 and 23 of the Constitution of the State of Washington provided as follows:

> "*Section 3.* Personal Rights.—No person shall be deprived of life, liberty, or property without due process of law.
>
> "*Section 12.* Special Privileges and Immunities Prohibited. No law shall be passed granting to any citizen, class of citizens, or corporation, other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations.
>
> "*Section 23.* Bill of Attainder Ex Post Facto Law, Etc.—No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed."

The defendants in the trial court demurred to the complaint on the grounds that the same did not state facts sufficient to constitute a cause of action and filed an amended answer and affirmative defense setting forth that Remington Revised Statutes, Section 10030 as amended by the laws of 1937, Chapter 45, particularly Section 10031-6 is in violation of Article XIV, Section 1 of the Constitution of the United States and in violation of Article I, Sections 3, 12 and 23 of the Constitution of the State of Washington.

The appellants likewise urged in the Supreme Court of the State of Washington that said law was unconstitutional, using the same grounds. The right to raise the question of constitutionality was protected in the trial court and in the Supreme Court and the decision of the Supreme Court (see Appendix A) holds that Section 10031-6 of Remington Revised Statutes of Washington is constitutional.

The dissenting opinions of Judge Mallery and Judge Hill, (see Appendix A) hold that said Section above quoted is in violation of the Constitution of the State of Washington, Article I, Section 12.

The Supreme Court of the United States has jurisdiction to hear this case on the grounds and authority that a constitutional question is involved. Particularly Article XIV, Section 1 of the Constitution of the United States (quoted verbatim above) has been violated and the right of the appellants as citizens of the United States have been jeopardized. The Constitution of the State of Washington (cited above) has likewise been violated and the only remedy left to the appellants herein is this appeal to the Supreme Court of the United States.

The Supreme Court of the United States accepted jurisdiction and ruled upon a similar situation in the case of *Liggett Company* v. *Baldridge*, 278 U. S. 104, 73 Law Ed. 204. In that case a statute was enacted in Pennsylvania requiring the owners of drug stores to be registered pharmacists. The lower court held the Act constitutional and within the police powers of the State. The Supreme Court of the United States held that the appellant's business was a property right and unless justified as a valid exercise of police power, must be declared unconstitutional. The Court stated on page 209 of the decision:

> "A state cannot, 'under the guise of protecting the public, arbitrarily interfere with private business or

prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.' ''

Statement of the Case

A. E. Boren and W. W. Shepherd sold on a Conditional Sales Contract a clinic fully equipped for the practice of dentistry, to a Dr. Charles D. Harlow. The clinic had been previously sold to a Dr. Bergman who died and whose interest in said clinic was taken over by Boren and Shepherd after negotiation with the widow. Boren and Shepherd are not licensed dentists and neither practiced dentistry. Dr. Harlow made a down payment on the contract and made monthly payments of $750.00 per month on the contract. It is not disputed but that his payments were current and the contract was in good standing.

The payments were made to a partnership consisting of Boren and Shepherd (known as the Dental Management Co.) and each of the partners received their respective share of the payments. As far as W. W. Shepherd is concerned the above is the extent of his activities with reference to the Harlow Clinic. He merely received his share of the monthly payments and no more. A. E. Boren worked for Dr. Harlow as office manager. He handled the advertising, the credits and hired the office help. He had nothing to do with the dental practice except as above stated. He paid income tax on what he received as a salary. Dr. Harlow owned the business and paid substantial bonuses to A. E. Boren for services rendered. The income tax records disclose that Dr. Harlow owned the Clinic and paid income tax on the profits of the business.

From this evidence the Court determined that Shepherd and Boren own, manage and operate the dental office known as Harlow Dental Clinic.

Question. Is a Statute in so far as it prohibits one who has not a license to practice dentistry from owning, maintaining or operating an office for the practice of dentistry in violation of the Constitution of the State of Washington and the Constitution of the United States?

Is it properly within the police powers of a State to determined that business activity, which clearly is not the practice of dentistry, is in fact the practice of dentistry?

While it is admitted that the legislature may say who can practice dentistry, can they say who can own or operate or manage a dental office?

Is there any difference between the business of managing an office where dentistry is practiced or owning said office and actually practicing dentistry?

The Questions Are Substantial

The questions raised in this appeal are substantial. In the first place it determines the rights of many owners of dental offices who employ licensed dentists to handle the actual dental practice. A substantial investment in the State of Washington is involved by those who sell their clinics to dentists and receive the payments each month. In the case of W. W. Shepherd, one of the appellants, one can search the record in vain to find any activity on his part other than his share of the monthly payment on a conditional sales contract. His position was exactly the same as a landlord or an equipment concern. A supply house may sell to a dentist certain equipment and retain the title to said equipment until the payments are completely paid. They *own* the clinic within the meaning of Remington Revised Statutes 10031-6 and ipso facto are practicing dentistry within the terms of said Statute.

Now instead of owning a part of the equipment, as vendor, Mr. Shepherd and Mr. Boren owned it all as vendors and the dentist by virtue of a recorded bona fide sale became the vendee. The decision against Shepherd must be based on ownership as vendor alone because no other evidence of his activity in connection with said clinic was offered or proven. Both he and Mr. Boren acted in good faith as the record discloses that when the first sale was made to Dr. Bergman the title was transferred and a chattel mortgage taken back. The License Department of the State of Washington suggested that they would prefer that the transaction be one of conditional sales rather than mortgage. This change was made and the subsequent sale to Dr. Harlow was in accordance with the wishes of the License Department of the State of Washington. To allow this decision to stand as to Shepherd would mean that every vendor of an article used by one who had to obtain a license for such use, is a law violator, unless he too is licensed. The vendor of an automobile used by a licensed taxi driver should be subject to the same regulation as the taxi driver. If this conclusion is not correct then the constitutional privileges as well as the immunities of a certain class of citizens of the State of Washington are being violated.

Article I, Sections 3, 12 and 23 of the Constitution of the State of Washington provide as follows:

> "*Section 3.* Personal Rights.—No person shall be deprived of life, liberty, or property without due process of law.
>
> "*Section 12.* Special Privileges and Immunities Prohibited. No law shall be passed granting to any citizen, class of citizens, or corporation, other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations.

"*Section 23.* Bill of Attainder, Ex Post Facto Law, Etc.—No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed."

The constitutional rights of citizens of the State of Washington are involved and especially are they deprived of their right to contract and their right to property, without due process, all of which is in violation of both the United States and Washington Constitutions.

The exact question determined by this case was presented to the Supreme Court of Washington in the case of *State* v. *Brown,* 37 Wash. 97; 97 Pac. 637 (1905). In that case the Supreme Court of Washington held that a similar (conceded by all parties that the wording is similar) statute was unconstitutional. That portion of the decision is quoted herein:

"It is solicitude for the physical well-being of the public, or that portion that may need dentistry work, which justifies that part of the statute providing for the examination and licensing of those who desire to 'treat diseases or lesions of the human teeth or of jaws or correct malpositions thereof.' To perform such work with safety and proper regard for health and comfort, the operator must possess technical knowledge and skill peculiar to the study and practice of dentistry. Can the same be said of one desiring to 'own, run, or manage' a dental office? We think not.

"To own and manage property is a natural right, and one which may be restricted only for reasons of public policy, clearly discernible. To hold this portion of the statute valid would be to make possible conditions which were never designed to exist. To illustrate, suppose a man thoroughly qualified and legally licensed as a dentist should die, leaving a perfectly and completely equipped dental office to his widow, who knew nothing of dentistry and was incapable of

securing a license. By continuing to 'own' this property any appreciable time she would become liable to prosecution, under this part of the statute. Can the police or any other power be constitutionally invoked to produce such a result? We are led to believe not. Let us carry the illustration a little further. The widow, not being able to sell the dental office to advantage, decides to hire competent and legally licensed dentists to treat patrons of the office, and undertakes the management herself, paying bills, collecting accounts, arranging credits, making appointments, and doing other acts necessary to the supervision and control of the business affairs of the concern. Then she becomes a criminal, if this portion of the statute have virtue, because she has 'managed a dental office.' And yet, it will scarcely be contended that any of these acts injuriously affect 'the health, good order, morals, peace, or safety' of society, or menace 'the lives, limbs, health, comfort, quiet or property' of the patients treated in such office. Many similar illustrations will readily occur to the mind given to the contemplation of the natural results reasonably to be anticipated under the operation of such a statute.

"A consideration of the province of the police power, in the light of constitutional rights, would seem to show, beyond controversy, that in the enactment of this portion of the statute the legislature transcended its authority. Should the owner or manager hire operators not legally qualified, or should they participate in the treatment or operations mentioned in the other portion of the statute, they would, of course, be amenable to and punishable under those provisions. But we are unable to say or perceive that the health, moral or physical welfare of the public, or any of the personal or property rights of its individuals, are endangered by the ownership and management of a dental office, so long as those employed therein to do the actual dentistry work are qualified and licensed as by law required."

The decision of the Supreme Court of Washington in this case reversed their own decision in the Brown case. While it may be conceded that times have changed since 1905, constitutional protection has not been modified and the protection of the Constitution stll covers the citizens of the commonwealth of Washington.

Perhaps the importance of this question and the reasoning which clearly shows that the constitutional rights of the appellants were violated can best be established by the following quotation from the dissenting opinion of Justice Mallery of the Supreme Court of Washington, concurred in by Judge Hill:

> "I do not question the right of the legislature to require a license for the practice of dentistry, but I cannot agree that the legislature can define something as dentistry which patently is not dentistry.
>
> "Any American citizen can own any tangible thing subject to ownership. Management and control of property is a prerogative of ownership of all who are *sui juris*.
>
> "The constitutional prohibition against special privileges and immunities bars the legislature from saying who can own what. To do otherwise, as in this case, is classification of property owners according to occupation. It is as unconstitutional as a classification according to race, creed or color. Property rights cannot be subjected to a caste system without destroying the essence of our American constitutional system of government. That it has been done by indirection, and while attention is focused elsewhere, does not change its effect.
>
> "The particular use permitted of property is, of course, another matter. Zoning and safety requirement laws have been upheld as proper exercises of the police power, but they have no reference to, or limitation upon, the ownership and the right to control as such, within the limitations of the law. The legislature can say who may practice dentistry, but it cannot say

who may own, maintain or operate a dental office. If it could do so, it could also say who may own barbershops or any other property used by licensees.

"Let it be remembered that the adequacy of the dental premises or equipment has not yet been subjected to the police power by any licensing provisions, and is not here in question. Neither is there here involved any question of wrongful advertising by which the public is misled, either as to the dentist personnel, their competency, or the nature of the service offered. Where equipment is not licensed, the only remaining concern of the state, upon which it can exercise its police power, is the competency of the operator.

"The exercise of the police power in this case purports to protect the public from incompetency in dentistry. The state cannot control the dentist-patient relationship for any other purpose.

"There seems to be a tacit assumption that all dentists who manage their own offices are good, and all others are bad, and that because dentistry is a profession the competency of its practitioners can be insured by requirements in addition to licensing. From decision to decision there has been copied a touching picture of the dentist-patient relationship which, if drawn merely to justify the licensing of the practice of dentistry, would have some cogency. Just what it proves with regard to a dentist's private financial affairs and nonprofessional acts, or its bearing on the ownership and management of property, which is neither itself a profession nor a necessary incident to any profession, has never been pointed out.

"There is no technique known to the courts by which the competency of a dentist can be determined, other than by his possession or lack of a license to practice dentistry. The law conclusively presumes that the possessor of such a license is competent and that all others are not.

"Of course, licenses may be required for both professional and nonprofessional activities involving the health, safety or convenience of the public. But, in all

cases, the licensing procedure is conclusive upon the question of the right to do the licensed act, and no valid distinction can be shown which would destroy property rights incident to the professions and not do likewise to all licensed occupations.

"Principles of law declared in cases involving constitutional questions, should have uniform application. The dodge of "each case upon its own facts" should never be used to destroy a constitutional right. Hence, if the majority opinion is sound in overruling the *Brown* case, it follows that, if an activity can be licensed under the police power, the ownership of all property connected therewith can be limited to licensees.

"While exercise of the police power is indispensable to any organized society, and its absence is anarchy, still unrestrained police power is found only under a despotism. Our American liberties inhere in the constitutional restraints upon the police power. It may be property used only to promote the health, safety, and convenience of *the public*. When misused as an economic device to promote special privileges for individuals in the ownership and management of property, it becomes an instrument of regimentation. Titles of nobility could be no more objectionable.

"Where, as here, the legislature has, by improper definition, grafted an economic discrimination prohibited by the constitution upon a measure otherwise within its power to enact, this court should segregate and invalidate the offending part, as was done in the *Brown* case."

Decision is in Conflict with U. S. Supreme Court Holding

It is respectfully submitted that the decision of the Supreme Court of the State of Washington is in conflict with a decision of this Court decided in 1928. Liggett Company v. Baldridge, U. S. 104, 73 Law Ed. 204. This Court, speaking through Justice Sutherland, declared an Act of the Pennsylvania Legislature unconstitutional. The Act pro-

vided that every pharmacy or drug store shall be owned by a licensed pharmacist and in the case of corporations, associations and co-partnerships, requires that all partners or members thereof shall be licensed pharmacists. (The Act in the instant case provides that ownership, management or control of a dental establishment must be a licensed dentist). The appellant was a Massachusetts corporation which sought to operate drug stores in Pennsylvania. All of the stockholders were not registered pharmacists and the State refused to grant the appellant a permit to carry on business. The equal protection clause of the 14th Amendment to the Constitution of the United States was involved. The lower court held that the statute was constitutional upon the ground that there was a substantial relation to the public interest in the ownership of a drug store where prescriptions were compounded. (The Supreme Court of the State of Washington in its decision held the Act constitutional on the ground that it was within the police powers of the Legislature and for the welfare of the public health.) This Court asked the question in the opinion: "What is the effect of mere ownership of a drug store in respect of the public health?"

In answering this question Justice Sutherland reasoned that a State may regulate the prescription and compounding of medicines by appropriate legislation to protect the public health and did so, just as in the instant case the State regulated who may practice dentistry. Justice Sutherland stated in the opinion:

> "It plainly forbids the exercise of an ordinary property right and, on its face, denies what the Constitution guarantees. A state cannot, 'under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.' " (Citing authorities—page 209 of 73 Law Ed.)

> * * * The claim that mere ownership of a drug store by one not a pharmacist bears a reasonable relationship to the public health, finally rests upon conjecture, unsupported by anything of substance. This is not enough; and it becomes our duty to declare the act assailed to be unconstitutional as in contravention of the due process clause of the 14th Amendment. Decree reversed."

The situation before the Court in this case is almost identical. All of the proof introduced at the trial was for the purpose of seeking to establish that Mr. Boren and Mr. Shepherd owned the Harlow Dental Clinic. There was absolutely no evidence introduced showing that said ownership, if it was proven, was detrimental to the public health. Any conclusion reached by the court on this point was purely speculative and not based on the evidence.

The stability of businesses established in conformity with a decision of the Supreme Court of the State of Washington enacted in 1905 and never changed until the present case, and in conformity with the decisions of this Court declaring unconstitutional similar statutes which would seek to encroach upon property rights guaranteed by the Constitution, is involved.

We believe that the questions presented by this appeal are substantial and that they are of public importance, and that the constitutional rights and privileges of citizens are involved and that this Court has jurisdiction.

Respectfullly submitted,

JEFFREY HEIMAN,
Counsel for Appellants.

APPENDIX "A"

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 31279 En Banc

THE STATE OF WASHINGTON; L. L. FOOTE and LANDO W. ZECH, APPELLANTS,

v.

A. E. BOREN, W. W. SHEPHERD, C. D. MARLOW and R. T. STICKELS, Respondents

Filed June 7, 1950

The state of Washington, and Foote and Zech, as interveners, commenced an action in the superior court for King county, alleging that defendants Boren and Shepherd had never been licensed to practice dentistry in the state of Washington, but that they had been and were then practicing dentistry in Seattle; that defendant Harlow was aiding and abetting them in the practice of dentistry at 1909 Westlake Avenue, in Seattle; that defendant Stickels was aiding and abetting them in the practice of dentistry at 1410 Second Avenue, Seattle. Plaintiff prayed that the defendants be enjoined from such illegal practices.

Defendants answered, denying all the allegations of the complaint, except the allegation that Boren and Shepherd were not licensed to practice dentistry in the state. As an affirmative defense, defendants alleged:

> "That Rem. Rev. Stat. Sec. 10030 as amended by the Laws of 1937, Chapter 45, particularly Sec. 10331-6, is in violation of Article XIV, Sec. 1 of the Constitution of the United States, and in violation of Article I, Sec. 3, Article I, Sec. 12, and Article I, Sec. 23 of the Constitution of the State of Washington."

At the close of the plaintiff's case, the court granted a motion of dismissal as to the defendant Stickels, on the ground that the testimony introduced by the plaintiff and interveners was not sufficient to establish a cause of action against such defendant. We are unable to say that the evidence preponderates against the finding and conclusion of the trial court in that regard, and will not burden this opinion with any discussion of the evidence concerning Stickels.

A. E. Boren and W. W. Shepherd never have been licensed to practice dentistry in the state. Dr. C. D. Harlow has been, and at the times involved in this transaction, was, licensed to practice dentistry in the state.

For some time prior to the events leading up to the transaction under consideration, Boren and Shepherd had been associated together as copartners (known as Dental Management Company) in the ownership, maintenance and operation of offices in the state for the practice of dentistry. They operated in Bremerton, Bellingham, Vancouver and Seattle.

One of such offices was at 1909-1913 Westlake Avenue, in Seattle. The equipment and furnishings therein cost them $13,782.45. In 1946 this business was transferred to one Dr. Bergman, a licensed dentist, by bill of sale in the amount of $45,000.00, secured by a mortgage. Dr. Bergman died in 1947. The business was thereupon turned back to the partnership, which then entered into a conditional sales contract with defendant, Dr. Harlow, for a consideration of $55,000.00. Dr. Harlow agreed to pay $750.00 a month on the contract.

As a part of this deal, Boren was employed as manager at $500.00 a month. Dr. Harlow testified concerning Boren's status:

> "He manages the office end of it, buying the supplies and watching the charts and making out the accounts

and payments, and general manager, and looking after the advertising."

Under this arrangement Dr. Harlow also drew a salary of $500.00. So we find that in addition to the ordinary costs of operation, there was each month paid out of the business, the following: To Dental Management Company, on the contract, $750.00; to Dr. Harlow, salary, $500.00; to Mr. Boren, salary, $500.00.

But this was not all. From March, 1947 to January, 1948, there was paid to Boren, in sums ranging from $500.00 to $1,500.00, as a "bonus", a total of $7,500.00. In 1948, up to the time of the commencement of this action, the following "bonus" payments were made to Boren: January, $1,000.00; February, $1,500.00; March, $750.00; April, $742.86: May, $616.51; May, $841.42; July, $1,265.16; August, $765.16. Dr. Harlow testified that the "bonus" payments were given in appreciation of the increase in business. No explanation was given as to why this money was not paid to the partnership in reduction of the contract obligation.

From all of the foregoing the trial court found, as do we, that the defendants Boren and Shepherd, with the knowledge and consent of defendant Harlow, own, manage and operate the dental office at 1909-1913 Westlake Avenue, Seattle.

However, the court concluded that Rem. Rev. Stat. (Sup.), § 10031-6, in so far as it prohibits one who has not a license to practice dentistry from owning, maintaining or operating an office for the practice of dentistry, is in violation of the constitution of the state of Washington under the decision of *State v. Brown*, 37 Wash. 97, 79 Pac. 635. The trial judge stated that, in his opinion, the decision in the *Brown* case was wrong, but that it was not within his province to overrule the supreme court. He accordingly

dismissed the case as to the defendants Boren, Shepherd and Harlow.

The people of this area, for their mutual benefit and protection, established the state of Washington. They are the state. Its acts are their acts. The state, under its police power, has the right, and it is its duty, to protect its people in their health and general welfare. The very existence of government, as well as the security of the social order, depends upon this right. This is especially true as to the health of the people, which affects every man, woman and child within the state. When a person engages the services of a doctor, a dentist, or an optometrist, he is entering a realm of which he knows practically nothing. Of necessity he must rely upon the skill and training of the expert to whom he goes. So the state, for the protection of its citizens, through the exercise of its police power, has attempted to regulate the conduct of such learned professions by requiring that each person practicing such a profession must first obtain a license to so practice. As a further precaution, the state has designated certain subjects, peculiar to the particular profession, in which the applicant must prepare himself before he can be examined as to his fitness to practice his profession.

The state of Washington, for a great many years, has required a license from the State Board of Dental Examiners before one may "treat diseases or lesions of the human teeth or of jaws or correct malpositions thereof." *State ex rel. Smith v. Board of Dental Examiners*, 31 Wash. 492, 72 Pac. 110. The defendant in the *Brown* case attacked the constitutionality of that portion of the then existing "dental law" which provided:

> "All persons shall be said to be practicing dentistry within the meaning of this act . . . who shall own, run, or manage a dental office . . ."

Subdivision 6 of Rem. Rev. Stat. (Sup.) § 10031, (the section declared unconstitutional by the trial court in the instant case) defines the practice of dentistry as follows:

> "A person practices dentistry, within the meaning of this act, . . . who owns, mantains or operates an office for the practice of dentistry; . . ."

It will thus be seen that the provisions of the two acts are practically identical.

In holding that portion of the "dental law" unconstitutional in the *Brown* case, this court said:

> "It is solicitude for the physical well-being of the public, or that portion that may need dentistry work, which justifies that part of the statute providing for the examination and licensing of those who desire to 'treat diseases or lesions of the human teeth or of jaws or correct malpositions thereof.' To perform such work with safety and proper regard for health and comfort, the operator must possess technical knowledge and skill peculiar to the study and practice of dentistry. Can the same be said of one desiring to 'own, run, or manage' a dental office? We think not.
>
> "To own and manage property is a natural right, and one which may be restricted only for reasons of public policy, clearly discernible. To hold this portion of the statute valid would be to make possible conditions which were never designed to exist. To illustrate, suppose a man thoroughly qualified and legally licensed as a dentist should die, leaving a perfectly and completely equipped dental office to his widow, who knew nothing of dentistry and was incapable of securing a license. By continuing to 'own' this property any appreciable time she would become liable to prosecution, under this part of the statute. Can the police or any other power be constitutionally invoked to produce such a result? We are led to believe not. Let us carry the illustration a little further. The widow, not being able to sell the dental office to advan-

tage, decides to hire competent and legally licensed dentists to treat patrons of the office, and undertakes the management herself, paying bills, collecting accounts, arranging credits, making appointments, and doing other acts necessary to the supervision and control of the business affairs of the concern. Then she becomes a criminal, if this portion of the statute have virtue, because she has 'managed a dental office.' And yet, it will scarcely be contended that any of these acts injuriously affect 'the health, good order, morals, peace, or safety' of society, or menace 'the lives, limbs, health, comfort, quiet or property' of the patients treated in such office. Many similar illustrations will readily occur to the mind given to the contemplation of the natural results reasonably to be anticipated under the operation of such a statute.

"A consideration of the province of the police power, in the light of constitutional rights, would seem to show, beyond controversy, that in the enactment of This portion of the statute the legislature transcended its authority. Should the owner or manager hire operators not legally qualified, or should they participate in the treatment or operations mentioned in the other portion of the statute, they would, of course, be amenable to and punishable under those provisions. But we are unable to say or perceive that the health, moral or physical welfare of the public, or any of the personal or property rights of its individuals, are endangered by the ownership and management of a dental office, so long as those employed therein to do the actual dentistry work are qualified and licensed as by law required."

Appellants urge the reexamination of the *Brown* case and submit that it be overruled. Since that decision, this court, in several instances, has had occasion to decide questions closely allied to the problem now confronting us.

Deaton v. Lawson, 40 Wash. 486, 82 Pac. 879, was an action on a contract for medical services between the State

Medical Institute and Deaton. Lawson, who owned, operated, managed and controlled the "State Medical Institute", employed therein Dr. Richards, a physician. In affirming a judgment of dismissal this court said:

> ". . . The findings of the court and the entire testimony clearly show that this was the personal contract of O. V. Lawson. The reference in the body of the contract to the State Medical Institute, its officers, and the physician in charge, and the claim of the appellant Lawson that he signed the contract as secretary for Dr. Richards, are but so many pretenses to evade the laws of the state. . . .
>
> "Stripped of all subterfuges and pretenses, this is neither more nor less than a contract on the part of appellant Lawson to render professional services for the respondent, a contract he could not perform without violating the laws of the state. The contract was therefore against public policy, and is utterly void."

State ex rel. Standard Optical Co. v. Superior Court, 17 Wn. (2d) 323, 135 P. (2d) 839, was a proceeding in the nature of *quo warranto* against the defendant corporation, charging it with unlawfully practicing optometry. The corporation operated a store in Wenatchee, which was in sole charge of a licensed optometrist employed and paid by the corporation. The corporation exercised no control over the professional judgment of the optometrist, who made his own determinations in advising whether or not glasses were needed. In holding that the course of business followed by the corporation constituted the practice of optometry and was therefore unlawful, we quoted with approval from the South Carolina case of *Ezell v. Ritholz,* 188 S. C. 39, 198 S. E. 419, as follows:

> "If such a course were sanctioned the logical result would be that corporations and business partnerships might practice law, medicine, dentistry or any other profession by the simple expedient of employing licensed agents. And if this were permitted professional standards would be practically destroyed, and profes-

sions requiring special training would be commercialized, to the public detriment. The ethics of any profession is based upon personal or individual responsibility. One who practices a profession is responsible directly to his patient or his client. Hence he cannot properly act in the practice of his vocation as an agent of a corporation or business partnership whose interests in the very nature of the case are commercial in character."

State ex rel. Lundin v. Merchants Protective Corporation, 105 Wash. 12, 177 Pac. 694, was a proceeding in *quo warranto* to inquire into the right of the respondent corporation to do business in the state. The corporation employed either an attorney, or a firm of attorneys, and then sent solicitors out to secure memberships. The membership fee was $10.00 a year, of which the corporation took $9.00 and gave $1.00 to the attorneys. Members were to be defended in all civil or criminal actions brought against them in police or justice of the peace courts, without charge. In holding that the corporation was unlawfully practicing law as a principal through its agents, we said:

"The practice of the law is not a business that is open to a commercial corporation.

" 'Since, as has been seen, the practice of law is not a lawful business except for members of the bar who have complied with all the conditions required by statute and the rules of the courts, and as these conditions cannot be performed by a corporation, it follows that the practice of law is not a lawful business for a corporation to engage in. As it cannot practice law directly, it cannot do so indirectly, by employing competent lawyers to practice for it, as that would be an evasion which the law will not tolerate.' 2 R. C. L. 946.

"See, also, In re Co-operative Law Co., 198 N. Y. 479, 92 N. E. 15, 139 Am. St. 839, 32 L. R. A. (N. S.) 55.

"The practice of the law is a personal right, and that the public may not be imposed upon by the unworthy, the law requires that those engaged in practice shall be men of good moral character and with certain qualifications and a degree of learning, to be ascertained by the

> agents, not of the courts, but of the whole people speaking through the legislative body. The right to practice law attaches to the individual and dies with him. It cannot be made a subject of business to be sheltered under the cloak of a corporation having marketable shares descendible under the laws of inheritance. One engaged in the practice of the law is subject to personal discipline for misconduct and to penalties for violating the ethics of the profession that could not possibly attach to a corporate body."

Laughney v. Maybury, 145 Wash. 146, 259 Pac. 17, was a proceeding by A. M. Laughney, a licensed and practicing osteopathic physician and surgeon, to enjoin the prosecuting attorney from prosecuting him for unprofessional conduct. We there said:

> "As to the right of a physician or surgeon to be protected in his profession under the guarantees of both constitutions, there is, of course, no doubt. It may be stated, generally, that anyone has a right to pursue any lawful calling, yet, in respect to certain vocations not in themselves unlawful, including the practice of medicine and surgery, the right is necessarily and properly subject to legislative restrictions or regulations from consideration of public policy. They are vocations which, from time to time and in one way or another, very nearly concern the health, comfort, life and general welfare of every person, and statutes designed to accomplish such restrictions or regulations are founded upon the police power inherent in the state."

Campbell v. State, 12 Wn. (2d) 459, 122 P. (2d) 458, was an action by Dr. J. C. Campbell, a duly licensed dentist, owning and operating a dental office in Seattle. He alleged that the director of licenses was threatening to prevent him from opening a dental office in Tacoma, in which he intended to participate by contract with a regularly licensed dentist; that the director of licenses claimed that in so doing the plaintiff would violate Rem. Rev. Stat. (Sup.), § 10031-18, which made it unlawful for a person to conduct a dental office

in his name, unless he was personally present operating as a dentist or personally overseeing such operations during a majority of the time. It was contended that the above statute was in violation of the constitutions of the United States and of the state of Washington. In holding the statute constitutional, we said:

"The provision of the statute here under attack must be considered with reference to the entire act of which it is a part. It may be presumed that, in the opinion of the legislature, the conduct of a dental office under the name of one who, although a licensed dentist, was not personally present in the office a majority of the time, was a pernicious practice, tending to mislead persons patronizing such office in the expectation that the services sought and paid for would be personally rendered or supervised by the dentist whose name is held out to the public as conducting the office. It cannot be held that the legislature was mistaken in acting upon the premise stated.

"The relationship between dentist and patient is inherently personal in the highest degree. Certainly it is within the province of the legislature to protect the public against all forms of fraud and deception tending to conceal the professional identity of the dentist who is, in fact, rendering the service in the particular office frequented by one in need of dental assistance. By the practice denounced by the act, the public may be unwittingly deprived of a personal relationship which may rightfully be expected, and another personality substituted therefor. The use of the name of a certain dentist as conducting an office for the practice of dentistry should mean something more than merely physical ownership of the office, or the right to use the name, which may have a value because of long continued use or commercial advertising.

"It may well be that the operation of the office in Tacoma, which appellant desires to open under his own name, would, in and of itself, result in no harm to the public. The legislature, however, was entitled to consider and deal with the general problem of the com-

mercial exploitation of the dental profession. If, in the opinion of the legislature, chain office dentistry and dental offices conducted under corporate or fictitious names, or under the name of a dentist who has nothing to do with the practice of the profession in connection with the carrying on of the office, tend to introduce into the profession unscrupulous practices which tend to lower the ethics and standards of the dental profession, to the injury of the health of the community and the public welfare, the legislature had the power to place the limitation in question upon the general practice of the profession, even though in certain cases the act forbidden might not result in any of the evils which it was believed might follow from the frequent employment of the forbidden practice.

"Appellant suggests a number of hypothetical situations, which he contends illustrate possible results from the enforcement of the statute, which would be violative of the constitutional rights referred to. It is suggested that, under the provisions of the statute in question, the widow of a deceased dentist could not conduct her late husband's practice under his name, nor under her own name, unless she were a licensed dentist, and that a dentist engaged in the practice of his profession under his own name would violate the statute and become liable to the penalties thereof if he were absent from his office for a while because of illness or for any other reason of convenience or necessity. It is also suggested that dental products bearing the personal name of their producer could not be advertised in connection with any dental office unless the producer were personally present a majority of the time.

"It must be assumed that a law will be given a reasonable and not a strained construction. We deem it unnecessary and inappropriate, in deciding the question here presented, to consider the possible application of the statute to the hypothetical situations suggested by appellant. Questions arising concerning the application of the statute to questions such as those suggested will be reserved for future consideration, when actually presented for judicial determination."

The general rule throughout the country is that no unlicensed person or entity may engage in the practice of medicine, surgery, or dentistry through licensed employees. See Annotation, 103 A. L. R. 1240. We have been unable to find a state court which has cited *State v. Brown* with approval. In fact, we have been unable to find that this court has cited it with approval. Rather, it has distinguished it in each instance. For two well considered cases from other jurisdictions on this precise subject see *State v. Bailey Dental Co.*, 211 Iowa 781, 234 N.W. 260, and *Parker v. Board of Dental Examiners*, 216 Calif. 285, 14 P. (2d) 67.

We agree with the general statement in *State v. Brown* that "to own and manage property is a natural right." But there is a clear distinction between the right of the state to interfere with the owning and managing of property, as such, and its right, under its police power, to protect the health of its people. Experience has shown that the care and treatment of the teeth requires, not only skill, but the personal relationship between dentist and patient. It requires the services of a trained expert, learned in his profession. The care and treatment of the teeth is not a business. It is not a commercial transaction. It is a profession. A person may own and sell dental equipment and supplies. But the state, in the exercise of its police power, has said that he cannot, without a license, practice dentistry. The state has said, in its wisdom, that a person practices dentistry "who owns, maintains or operates an office for the practice of dentistry." There can be no question but that the activities of Boren and Shepherd come within this definition. The state has decided that such a practice does not adequately protect the health of its people. Clearly, such a regulation is a reasonable exercise of its police power.

For the reasons hereinabove assigned, the decision in *State v. Brown* is hereby overruled.

The judgment of dismissal as to respondent Stickels is affirmed. The judgment of dismissal as to respondents Boren, Shepherd and Harlow is reversed and remanded

with directions to grant the prayer of appellant's complaint as to them.

SCHWELLENBACH, *J.*

We concur: Simpson, C. J., Beals, J., Robinson, J., Grady, J., Hamley, J., Donworth, J.

No. 31279

MALLERY, J. (dissenting)—Rem. Rev. Stat. (Sup.), § 10031-6, which provides: "A person practices dentistry . . . *who owns, maintains or operates an office for the practice of dentistry;* . . ." (Italics mine.) contravenes Art I, § 12, of the Washington constitution, which provides:

"No law shall be passed granting to any citizen, class of citizens, or corporation, other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."

I do not question the right of the legislature to require a license for the practice of dentistry, but I cannot agree that the legislature can define something as dentistry which patently is not dentistry.

Any American citizen can own any tangible thing subject to ownership. Management and control of property is a prerogative of ownership of all who are *sui juris.*

The constitutional prohibition against special privileges and immunities bars the legislature from saying who can own what. To do otherwise, as in this case, is classification of property owners according to occupation. It is as unconstitutional as a classification according to race, creed or color. Property rights cannot be subjected to a caste system without destroying the essence of our American constitutional system of government. That it has been done by indirection, and while attention is focused elsewhere, does not change its effect.

The particular use permitted of property is, of course, another matter. Zoning and safety requirement laws have been upheld as proper exercises of the police power, but they have no reference to, or limitation upon, the ownership and the right to control as such, within the limitations of

the law. The legislature can say who may practice dentistry, but it cannot say who may own, maintain or operate a dental office. If it could do so, it could also say who may own barber shops or any other property used by licensees.

Let it be remembered that the adequacy of the dental premises or equipment has not yet been subjected to the police power by any licensing provisions, and is not here in question. Neither is there here involved any question of wrongful advertising by which the public is misled, either as to the dentist personnel, their competency, or the nature of the service offered. Where equipment is not licensed, the only remaining concern of the state, upon which it can exercise its police power, is the competency of the operator.

The exercise of the police power in this case purports to protect the public from incompetency in dentistry. The state cannot control the dentist-patient relationship for any other purpose.

There seems to be a tacit assumption that all dentists who manage their own offices are good, and all others are bad, and that because dentistry is a profession the competency of its practitioners can be insured by requirements in addition to licensing. From decision to decision there has been copied a touching picture of the dentist-patient relationship, which, if drawn merely to justify the licensing of the practice of dentistry, would have some cogency. Just what it proves with regard to a dentist's private financial affairs and nonprofessional acts, or its bearing on the ownership and management of property, which is neither itself a profession nor a necessary incident to any profession, has never been pointed out.

There is no technique known to the courts by which the competency of a dentist can be determined, other than by his possession or lack of a license to practice dentistry. The law conclusively presumes that the possessor of such a license is competent and that all others are not.

Of course, licenses may be required for both professional and nonprofessional activities involving the health, safety or convenience of the public. But, in all cases, the licensing procedure is conclusive upon the question of the right to do the licensed act, and no valid distinction can be shown which

would destroy property rights incident to the professions and not do likewise to all licensed occupations.

Principles of law declared in cases involving constitutional questions, should have uniform application. The dodge of "each case upon its own facts" should never be used to destroy a constitutional right. Hence, if the majority opinion is sound in overruling the *Brown* case, it follows that, if an activity can be licensed under the police power, the ownership of all property connected therewith can be limited to licensees.

While exercise of the police power is indispensable to any organized society, and its absence is anarchy, still, unrestrained police power is found only under a despotism. Our American liberties inhere in the constitutional restraints upon the police power. It may be properly used only to promote the health, safety, and convenience of *the public*. When misused as an economic device to promote special privileges for individuals in the ownership and management of property, it becomes an instrument of regimentation. Titles of nobility could be no more objectionable.

Where, as here, the legislature has, by improper definition, grafted an economic discrimination prohibited by the constitution upon a measure otherwise within its power to enact, this court should segregate and invalidate the offending part, as was done in the *Brown* case.

MALLERY, *J.*

I concur. Hill, J.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 373

A. E. BOREN, W. W. SHEPHERD AND C. D. HARLOW,
Appellants,

vs.

STATE OF WASHINGTON, L. L. FOOTE AND LANDE W. ZECH

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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Section 10031-6 2

Washington State Dental Code:
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Subdivision 6 2
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SUPREME COURT OF THE UNITED STATES

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STATE OF WASHINGTON, L. L. FOOTE AND LANDE W. ZECH

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

STATEMENT IN OPPOSITION TO APPELLANTS' STATEMENT OF JURISDICTION AND MOTIONS TO DISMISS OR AFFIRM.

The appellees in the above entitled cause for their joint statement in opposition to appellants' statement as to jurisdiction herein and in support of appellees' motion to dismiss or affirm, all pursuant to Rule 12, Paragraph 3 of the

Revised Rules of the Supreme Court of the United States, respectfully show the following:

I

Statement of Issues on Appeal

Subdivision 23 of the Washington State Dental Code (Remington's Revised Statutes, Section 10031), provides that (among others)

> "each prosecuting attorney, * * *, or any citizen of any county where any person shall engage in the practice of dentistry as herein defined without possessing a valid license so to do, may in accordance with the laws of this state governing injunctions, maintain an action in the name of the state to enjoin such person from engaging in the practice of dentistry as herein defined until a valid license to practice dentistry be secured * * *."

Subdivision 4 of that section prohibits the practice of dentistry by any person without a license and Subdivision 6 defines the practice of dentistry as follows:

> "A person practices dentistry, within the meaning of this act, * * *; who owns, maintains or operates an office for the practice of dentistry; * * *."

The Superior Court of the State of Washington in and for the County of King and the Supreme Court of the State of Washington found that the appellants, Boren and Shepherd, not licensed dentists, aided and abetted by the defendant Harlow, a licensed dentist, were practicing dentistry within the meaning of Section 10031-6 in Seattle, King County, Washington, in that Boren and Shepherd leased and fully equipped premises for the operation of a dental office; that despite the attempted legal subterfuge in the form of the paper conditional sale of the office to defendant Dr. Harlow and the purported operation and management by Dr. Har-

low, nevertheless, in fact, the dental office was owned, maintained and operated by the partnership of Boren and Shepherd (known as Dental Management Co.) with Dr. Harlow revealed in his true role of employee. The Washington Court concluded that the defendants-appellants, Boren and Shepherd, with the knowledge and consent of defendant Harlow, owned, managed and operated a dental office at Westlake Avenue, Seattle, Washington, and ordered such activity to be enjoined.

Appellants claim that under this state of facts the application of Remington's Revised Statutes, Section 10031-6 brings the statute in conflict with Article XIV, Section 1 of the United States Constitution.

Appellants' assignment of errors include reference to the Constitution of the State of Washington and to findings of fact made by the lower courts. It is respectfully submitted that these matters involve no Federal question but were determined under and pursuant to the Washington Court's interpretation of its own laws, the review of which is not here available to appellant. *Whitney* v. *California*, 274 U. S. 357, 71 L. ed. 1095, 47 S. Ct. 641; *Dewey* v. *Des Moines*, 173 U. S. 193, 43 L. ed. 665, 19 S. Ct. 379; *Grayson* v. *Harris*, 267 U. S. 352, 69 L. ed. 652, 45 S. Ct. 317.

The issues to be raised on this appeal must necessarily be limited to those presented by the case which is before the Court. In this regard it is material and we believe incumbent upon the Supreme Court to accept the construction placed upon the statute by the Washington Court and to proceed from there with its determination whether the statute as thus construed must be said to be in violation of the Fourteenth Amendment.

The Washington Court has not held that the mere ownership of naked legal title, without more, comes within the statutory definition of the practice of dentistry. The holding which the Court must here review is that these defend-

ants-appellants in the type of enterprise in which they were engaged came within the statutory determination and thus the statutory prohibition. The Washington Court specifically found that the defendants, Boren and Shepherd, not only owned, but also operated and managed, the dental office in question.

Under the police power the very ownership of an article may be prohibited when the use of that article necessarily affects the public health, safety or morals. *Terrace* v. *Thompson*, 263 U. S. 197, 68 L. ed. 255, 44 S. Ct. 15 (1923); *Purity Extract & Tonic Company* v. *Lynch*, 226 U. S. 192, 57 L. ed. 184, 33 S. Ct. 44 (1912); *Patsone* v. *Pennsylvania*, 232 U. S. 138, 58 L. ed. 539, 34 S. Ct. 281 (1913). (The first and third of the three cited cases should be read in conjunction with *Yick Wo* v. *Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 S. Ct. 1064 (1886)). But the question of bare ownership is not presented here. It is the use of the property involved that is here subjected to the licensing power of the State. Defendants, Boren and Shepherd, have been forbidden to "own, maintain and operate an office for the practice of dentistry".

If the statutory phrase, "office for the practice of dentistry", is defined as "an officer where dentistry is (actively) practiced", the statute becomes clearly not a prohibition of ownership but a prohibition of use.

A dental office is more than a room or rooms equipped with dental chairs, x-ray machines, sterilizers and old magazines. The ownership by a non-licensed person of these and the other specific articles usually found in a dental office is not here involved. If "an office for the practice of dentistry" is defined as only these specific articles, then appellants' position might be justified; but the very quoted words themselves indicate something more than the mere physical assets of the office; that something more is "the

practice of dentistry", the actual carrying on of the profession. A dental supply house does contain all the usual items found in a dental office. To argue that under the Washington Dental Code the supply house is "practicing dentistry" under the statutory definition would be to distort the language of the statute and make a ridiculously strained construction of the legislative intent.

Once, however, the inanimate objects in the supply house are brought together and used to construct an "office for the practice of dentistry" their significance changes. The equipment can then be used for no other purpose except the "practice of dentistry", and the use of the property then comes within the statutory definition. It is not the mere ownership of the articles involved that is regulated by the statute in question; what is regulated is the use of the articles for the practice of dentistry.

This is the construction given to the language by the Supreme Court of Washington in applying the statute in the instant case, and it is respectfully submitted that the language in context logically permits of no other interpretation.

It is the state court's function to interpret the enactments of its own Legislature and what the Court, in substance, has found in this: That the Legislature, in adopting the language defining the activity which, for the protection of the people, should be licensed, as the practice of dentistry, intended to include activity such as was here engaged in by the appellants, Boren and Shepherd. The Washington Court has not found the horribles paraded by appellants to be within the meaning of the statute here involved and the horribles are in no way pertinent to this appeal.

Thus the only question available to appellant here is whether the quoted portions of the Washington Dental Code, as applied to these particular defendants on the par-

ticular facts formed, violate Article XIV, Section 1, of the Constitution of the United States.

II

No Substantial Federal Question Presented by This Appeal

It is respectfully submitted that the Washington statute here in question is within the legislative power of the state.

A. *Appellants' Argument.*

Appellants' argument is twofold: (1) A non-licensed person who owns, maintains or operates a dental office and hires duly licensed dentists to do all the dentistry cannot be said to be practicing dentistry; (2) a statute which (a) defines such activity as the practice of dentistry (b) requires a dental license for such practice and (c) enjoins such activity by an unlicensed person, violates the Fourteenth Amendment.

B. *Correct Rule.*

The rule is that an unlicensed person or corporation offering dental services and hiring licensed dentists to perform the services is illegally practicing the particular profession.

C. *Authority for Rule as Stated by Appellees.*

1. *Six cases involving practice of dentistry deciding precise issue involved here.*

(a) *Parker* v. *Board of Dental Examiners*, 216 Cal. 285, 14 P. (2d) 67 (1932), expressly held that it is unlawful for a corporation or non-licensed person to indirectly practice dentistry by owning a dental office and hiring licensed dentists. It was also therein held that in legal contemplation

the "business" or "management" side of dentistry cannot be distinguished from the practice of dentistry itself. Quoting from 14 P. (2d) 71:

> ". . . But we are not prepared to hold with the contention that a corporation or an unlicensed person may not be prevented from managing, conducting, or controlling what petitioner terms the 'business side' of the practice of dentistry. The law does not assume to divide the practice of dentistry into that kind of departments. Either one may extend into the domain of the other in respects that would make such a division impractical if not impossible. The subject is treated as a whole. If the contention of appellant be sound, then the proprietor of the business may be guilty of gross misconduct in its management and violate all standards which a licensed dentist would be required to respect and stand immune from any regulatory supervision whatsoever. His employee, the licensed dentist, would also be immune from discipline upon the ground that he was but a mere employee and was not responsible for his employer's misconduct, whether the employer be a corporation or a natural person. On grounds of public policy such a condition could not be countenanced. . . ."

(b) *State* v. *Williams*, 211 Ind. 186, 5 N. E. (2d) 961 (1937), held that provisions of the Indiana Dental Code tantamount to the portions of the Washington Dental Code here in question were valid.

Quoting from 5 N. E. (2d) 965:

> "(3, 4) The other two exceptions taken by appellee, and claimed to be void, are 'one who owns or operates a dental office,' and 'who is the manager or conductor of the same,' as defining the practice of dentistry. . . .
>
> * * * * * * *
>
> ". . . If a person alone, or an association of persons who fail to have the necessary learning to pass

the dental examinations, can own, manage, and operate a dental parlor with a licensed dentist in charge, then all the statutes regulating the practice of dentistry would be of no effect. The standards and ethics of the dental office, the class of workmanship, and the price, would be regulated by the owner or manager. The purpose of the dental statute is to prevent any one from practicing dentistry who is not duly licensed and qualified, and any one who is not so qualified can neither directly nor indirectly practice dentistry. If one who is not qualified and licensed to practice is permitted to select and rent an office, and then employ licensed dentists to do the actual work, either upon a commission or salary basis, he would certainly be doing a dental business, and would be doing indirectly what he could not do directly.

* * * * * * *

"We are of the opinion that none of the provisions of the dental act complained of by the appellee violates any provision of the State or Federal Constitutions."

(c) *People* v. *Carroll*, 274 Mich. 451, 264 N. W. 861 (1936), decided the same issue found in the present case. The Michigan statute required the owner or operator of a dental office to be a licensed dentist. The defendant was not licensed but was a partner in the ownership and operation of a dental office (the precise factual situation in the present case). His conviction for practicing dentistry through owning and operating a dental office was affirmed.

Quoting from 264 N. W. 862:

"It is a well known fact that in the profession of dentistry the services rendered are personal and call for knowledge in a high degree, and that to separate this knowledge from the power of control is an evil, the correction of which was attempted by the instant legislation. The evils which arise from divorcing the 'power of control' from 'knowledge' apply with equal force to a partnership as well as a corporation.

". . . Courts distinguish between professions and businesses. In the latter, individuals may engage in the common occupations of life and laws which unnecessarily impair these rights must be held unconstitutional; but in the practice of a profession such as dentistry which has to do with personal privacy and where the licensee must possess skill and character, we think it is within the police power of a state to control and regulate the ownership and operation by a firm of a dental parlor as well as prescribe the qualifications of those who engage in its practice."

(d) *State* v. *Bailey Dental Co.*, 211 Iowa 781, 234 N. W. 260 (1931), held that a corporation equipping and owning a dental office and hiring licensed dentists was illegally practicing dentistry.

Quoting from 234 N. W. 262:

"Defendant's first contention is that it is not practicing dentistry. . . . Its unlicensed officials necessarily determine all its policies whether they be deemed professional or commercial. If such officials were to carry on this business as individuals without the formality of a corporate organization and without a license, would they be amendable to the statutes above quoted as violators thereof? The affirmative on this question seems too plain to tolerate argument. If these officials could not, as individuals, conduct this business without a license, we can conceive of no reason why they should be permitted to do so under the statute under a corporate organization and name. If a business thus conducted by an individual be unlawful, it is likewise unlawful if conducted by a corporation."

* * * * * * *

"We hold therefore that the defendant corporation was practicing dentistry; and was doing so therefore in violation of the statute."

(e) *Rust et al.* v. *State Board of Dental Examiners of Wisconsin,* 216 Wisc. 127, 256 N. W. 919, decides the issue here involved.

Quoting from 256 N. W. 921:

> "The law contemplates regulation of the profession to such an extent as to protect the public, not only against the acts of unprofessional conduct of licensed dentists, but also against those who, by management or some other intimate relation, are in charge of those who are practicing dentistry under a single management. . . ."

(f) *People* v. *Painless Parker, Dentist,* 85 Colo. 304, 275 Pac. 928 (1929) (cert. den. (1929) 280 U. S. 566, 74 L. Ed. 620, 50 S. Ct. 25), held that a corporation maintaining and operating a dental office, employing licensed agents to do the dental work was illegally engaged in the practice of dentistry.

2. *Correct Rule Recognized by United States Supreme Court.*

The United States Supreme Court had occasion to recognize the rule as stated by appellees in *Semler* v. *Oregon State Board of Dental Examiners,* 294 U. S. 608, 79 L. Ed. 1086, 55 S. Ct. 570 (1935). In that case, the Court speaking through Mr. Chief Justice Hughes, said at 79 L. Ed. 1089:

> ". . . We have held that the State may deny to corporations the right to practice, insisting upon the personal obligations of individuals . . ."

This necessarily applies to the present case. Manifestly, a corporation cannot pull teeth or fill cavities. It can "practice" dentistry only by employing dentists as agents to render services in the dental office which it owns and operates.

Corporations have the same rights as individuals under the Fourteenth Amendment. *Liggett Co.* v. *Baldridge*, 278 U. S. 105, 73 L. Ed. 204, 49 S. Ct. 57 (1928).

Therefore, if a state can deny to a corporation the right to practice dentistry indirectly through licensed agents, the state can deny to a non-licensed person the same right.

D. *Appellants Cite Two Cases; One Overruled, One Distinguishable*

Appellants' sole authorities are the cases of *State* v. *Brown*, 37 Wash. 97, 97 Pac. 635 (1905), and *Liggett Co.* v. *Baldridge*, 278 U. S. 105, 73 L. Ed. 204, 49 S. Ct. 57 (1928).

1. *State* v. *Brown*, 37 Wash. 97, 97 Pac. 635 (1905), was overruled by the Washington Supreme Court in deciding the present case.

2. *Liggett Co.* v. *Baldridge*, 278 U. S. 105, 73 L. Ed. 204, 49 S. Ct. 57 (1928), the opinion written by Mr. Justice Sutherland (Mr. Justice Holmes, joined by Mr. Justice Brandeis, dissenting) held unconstitutional a Pennsylvania statute. The statute required that every drugstore be owned only by a licensed pharmacist or, if owned by a corporation or partnership, that all members or co-partners be licensed pharmacists. The statute was held to contravene the due process clause of the Fourteenth Amendment when applied to a Massachusetts corporation authorized, at the time the statute was passed, to operate drugstores in Pennsylvania. The majority reasoned (1) that the operation of a drugstore is a business right protected by the due process and equal protection clauses, (2) that a corporation is a person within the meaning of the Fourteenth Amendment and is protected from State legislation contravening the Federal Constitution, (3) that the police power may be exerted in the form

of state legislation where otherwise the 14th Amendment would be violated only when the legislation bears a substantial relation to the public health, safety, morals, or welfare, (4) that mere stock ownership in a corporation owning and operating a drug store has no substantial relation to the public health, (5) that the act creates an unreasonable and unnecessary restriction upon *private business,* (6) that there is no evidence in or outside the record that ownership of such stock by persons not licensed pharmacists is detrimental to the public health, (7) that the claim that ownership of a drugstore by one not a pharmacist bears a reasonable relation to the public health rests upon conjecture unsupported by anything of substance either in or outside the record, (8) that the act must therefore be declared unconstitutional.

The minority reasons: (1) that a criticism of corporations in business is that the owners know nothing about the business, (2) that the divorce between knowledge and power of control is an evil, (3) that the selling of drugs and poisons calls for knowledge in a high degree, (4) that if all the owners of a drugstore corporation were pharmacists, the owners would be more likely to exert an intelligent control, (5) that preventive legislation does not have to work a perfect cure, it being enough if it has a manifest tendency to cure or lessen the evil, (6) that a corporation offering professional services is not beyond legislative control merely because all the services are rendered by qualified members of the profession, (7) that the present act is a valid exercise of legislative power and needs no conciliatory phrase like "police power" to uphold it, (8) but that "police power" as defined clearly extends to a law like this, (9) that whatever the wisdom of the law may be, the statute should be upheld.

3. *The Liggett Case Distinguished on Two Bases.*

(a) *Distinction between ownership and operation of drugstore and dental office*

(1) *Drugstore involves many activities; dental office includes only practice of dentistry*

The operation of a drugstore, in today's society, involves many things other than the practice of pharmacy, drugstores no longer being apothecary shops. The operation of a dental office involves only the practice of dentistry. The statute in the *Liggett case* would give to pharmacists a near monopoly, not only in the practice of pharmacy but also in many common business activities not ordinarily subject to such regulation, i.e. soda fountains, tobacco counters, and the other incidents of a "drugstore" today. The statute in the present case gives to licensed dentists a monopoly only in the practice of dentistry. In this day and age non-dentists do not create an "office for the practice of dentistry" with the intent to maintain a legitimate activity such as manufacturing, dealing in, and selling dental supplies, or such as selling or renting out dental offices like rooms in a hotel. Such men can only intend to practice dentistry through licensed agents, a forbidden activity.

(2) *Operation of drugstore is ordinary business; operation of dental office is practice of a profession*

The second phase of the first basis of distinction is that the *Liggett case* holds the operation of a drugstore to be an ordinary "private business", while it is apparent that the operation of a dental office is the practice of a profession.

In *People* v. *Painless Parker, Dentist*, 85 Colo. 304, 275 Pac. 928 (Colo. 1929) (Cert. den. (1929) 280 U.S. 566, 74

L. ed. 620, 50 S. Ct. 25) (cited *supra*), the same issue was involved as is involved in the present case, and the defendant unsuccessfully relied on the *Liggett* case. The Colorado Supreme Court distinguished the *Liggett case* in the following pertinent language, quoting from 275 Pac. 931:

> "Our attention is called by the defendant to a recent decision of the Supreme Court of the United States, Louis K. Liggett Co. *v.* Baldrige, 278 U. S. 105, 49 S. Ct. 57, 73 L. Ed. . The Court held in that case that a Pennsylvania statute, which prohibited ownership of drug stores or interest in corporations, partnerships, or associations owning such stores by other than licensed pharmacists was invalid as denying due process of law under the Fourteenth Amendment. The case is not pertinent here. The court held in the *Baldridge* case that the plaintiff corporation was conducting an ordinary business—not that it was engaged in or assumed to be practicing a profession—and the opinion states that mere ownership and operation of a drug store can have no real or substantial relation to the public health. The conclusion, therefore, there was that the 'act in question creates an unreasonable and unnecessary restriction upon *private business.*' This clearly differentiates the applicable principles of law where restrictions are placed upon a private business and where restrictions and regulations which are, as in the case now before us, as to matters that affect the public health like the practice of dentistry. This case is really, by a process of elimination, authority for our conclusion here that a person has no absolute or constitutional property right to engage in the practice of a profession such as law, medicine, or dentistry. And if a natural person, a human being, or a private corporation, an artificial person, is unable to meet or fulfill the reasonable conditions by compliance with which only the state confers a right to engage in the practice of a profession, he or it may not be heard to complain. He is deprived of no constitu-

> tional or statutory right whether the inability to comply with the regulations of the Legislature is due, as in the case of a corporation, to natural or inherent difficulties or inability, or in the case of a natural person or a human being, to bring himself within the requirements because of his mental or moral unfitness."

It is submitted that the reasoning of the Colorado Supreme Court is correct and that the *Liggett case* is not pertinent here.

(b) *Distinction Between Statute and Record in Liggett Case and Statute and Record in Present Case.*

The Washington Legislature explicitly defines "practice of dentistry" to include "one who owns, maintains or operates an office for the practice of dentistry"; the Pennsylvania statute required the owner of a drugstore to be a licensed pharmacist but did not define "practice of pharmacy" to include the owner of a drugstore; the Washington court has found these defendants to be practicing dentistry; there is no finding in the *Liggett case* that the Liggett Co. was practicing pharmacy.

The majority opinion in the *Liggett case* struck down the statute because there was nothing of substance in or outside of the record—only conjecture—to show that the ownership of a drug store by a non-pharmacist bore a reasonable relation to the public health.

Here, there is more than conjecture to show that the proscribed activity bears a reasonable relation to the public health.

The definition of practice of dentistry which includes "one who owns, maintains, or operates an office for the practice of dentistry" was not made by the Washington Court but was explicitly written into the Dental Code by the Washington Legislature and is part of the record in this case. The Washington Court determined, both as a finding

of fact and as a conclusion of law necessarily based on evidence in the record, that appellants fell within the statutory definition and were practicing dentistry, an activity patently affecting the public health.

In the *Liggett case*, there was neither a legislative expression that the ownership of a drugstore constituted the practice of pharmacy, nor was there a judicial finding of fact or conclusion of law that the activities of the Liggett Co. constituted the practice of pharmacy.

E. *Factual Situation Justifying Statute in Question May Be Reasonably Presumed; Therefore Statute Must Be Upheld*

In passing upon the constitutionality of a statute enacted pursuant to the police power, it is not necessary that the Court find the existence of a state of facts which would justify the legislature's having enacted the particular statute in question, it being sufficient if it be deemed within the bounds of reasonable possibility that such a state of facts may exist.

It might reasonably be presumed (1) that it is an evil to divorce the power of control of a dental office from the knowledge of the skilled dentist; or (2) that to allow a non-dentist to own and control a dental office would cause the practice therein to become commercialized to the public detriment, or to be conducted in some other manner not conforming to the ethics of the profession; or (3) that a dentist who works for a non-dentist would not devote nor be required by his employer to devote to his patients the same skill and effort that the same dentist working for himself or a licensed dentist would exercise; or (4) that dentistry is not divisible into a "business side" and "actual practice"; or (5) that it is just as important to demand a professional standard in determining advertising, setting

and collecting fees, and the other incidentals of dental practice, as it is to demand the same standard in the actual, technical dentistry.

Any or all of these or other states of fact could exist which would justify the legislature in requiring a person to be a licensed dentist to own, maintain, or operate a dental office. Therefore, that requirement of the Dental Code of the State of Washington must be upheld.

We therefore respectfully submit that the enactment of the statute here in question was a proper exercise of the police power. We further submit that the question presented by this appeal has been so definitely determined that no substantial question is presented entitling appellants to invoke the jurisdiction of the Supreme Court of the United States.

WHEREFORE, appellees respectfully move that the within appeal be dismissed or that the final decree and judgment of the Supreme Court of the State of Washington be affirmed.

Respectfully submitted,

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No. 373. BOREN ET AL. *v.* STATE OF WASHINGTON ET AL. Appeal from the Supreme Court of Washington. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Jeffrey Heiman* for appellants. *John J. Sullivan* for appellees. Reported below: 36 Wash. 2d 522, 219 P. 2d 566.